

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT A. GIBBS,

Petitioner,

v.

UNKNOWN,

Respondent.

No. 2:21-cv-2023 CKD P

ORDER AND

FINDINGS AND RECOMMENDATIONS

Petitioner, a state prisoner proceeding pro se, has filed an amended application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Under Rule 4 of the Rules Governing Section 2254 Cases, the court must review all petitions for writ of habeas corpus and summarily dismiss any petition if it is plain that the petitioner is not entitled to relief. The court has conducted that review.

The exhaustion of state court remedies is a prerequisite to the granting of a petition for writ of habeas corpus. 28 U.S.C. § 2254(b)(1). A petitioner satisfies the exhaustion requirement by providing the highest state court with a full and fair opportunity to consider all claims before presenting them to the federal court. Picard v. Connor, 404 U.S. 270, 276 (1971); Middleton v. Cupp, 768 F.2d 1083, 1086 (9th Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

After reviewing the petition for habeas corpus, the court finds that petitioner has failed to exhaust state court remedies. The claims have not been presented to and rejected by the

1 California Supreme Court. Further, there is no allegation that state court remedies are no longer
2 available to petitioner. Accordingly, the petition should be dismissed without prejudice.¹

3 Good cause appearing, IT IS HEREBY ORDERED that:

4 1. The Clerk of the Court is directed to serve a copy of these findings and
5 recommendations together with a copy of the petition filed in the instant case on the Attorney
6 General of the State of California; and

7 2. The Clerk of the Court assign a district court judge to this case.

8 IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas
9 corpus be dismissed for failure to exhaust state remedies.

10 These findings and recommendations are submitted to the United States District Judge
11 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
12 after being served with these findings and recommendations, any party may file written
13 objections with the court and serve a copy on all parties. Such a document should be captioned
14 "Objections to Magistrate Judge's Findings and Recommendations." In his objections petitioner
15 may address whether a certificate of appealability should issue in the event he files an appeal of
16 the judgment in this case. See Rule 11, Federal Rules Governing Section 2254 Cases (the district
17 court must issue or deny a certificate of appealability when it enters a final order adverse to the
18 applicant). Where, as here, a habeas petition is dismissed on procedural grounds, a certificate of
19 appealability "should issue if the prisoner can show: (1) 'that jurists of reason would find it
20 debatable whether the district court was correct in its procedural ruling;' and (2) 'that jurists of
21 reason would find it debatable whether the petition states a valid claim of the denial of a
22 constitutional right.'" Morris v. Woodford, 229 F.3d 775, 780 (9th Cir. 2000) (quoting Slack v.
23 McDaniel, 529 U.S. 473, 484 (2000)). Any response to the objections shall be served and filed
24 within fourteen days after service of the objections. The parties are advised that failure to file

25 ¹ Petitioner is cautioned that the habeas corpus statute imposes a one-year statute of limitations
26 for filing non-capital habeas corpus petitions in federal court. In most cases, the one year period
27 will start to run on the date on which the state court judgment became final by the conclusion of
28 direct review or the expiration of time for seeking direct review, although the statute of
limitations is tolled while a properly filed application for state post-conviction or other collateral
review is pending. 28 U.S.C. § 2244(d).

1 objections within the specified time may waive the right to appeal the District Court's order.

2 Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 Dated: May 4, 2022

Carolyn K. Delaney

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CAROLYN K. DELANEY
UNITED STATES MAGISTRATE JUDGE

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